IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of	:	Juhani LATVAKOSKI
Application No.	:	09/980,897
Confirmation No.	:	1451
Filing Date	:	March 25, 2002
Group	:	2616
Examiner	:	Min Jung
Title	:	METHOD FOR ALLOCATING COMMUNICATION RESOURCES

September 4, 2007

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313

PETITION TO WITHDRAW FINALITY OF OFFICE ACTION

Applicant acknowledges the Office Action dated June 8, 2007 in response to Applicant's Request for Complete Office Action filed on or about April 29, 2007. As requested in the Request for Complete Office Action, the current Office Action provides a response to one of applicant's arguments made against the Wallentin patent used in a prior art rejection of the claims, which response had been missing from the previous Office Action. However, the current Office Action dated June 8, 2007 is improperly made final. Applicant therefore petitions for the finality of the Office Action to be withdrawn.[1]

[1] Applicant has asked the Examiner to reconsider the finality of the Office Action, and the request for reconsideration was denied. See Interview Summary dated July 11, 2007.

Background

The first Office Action dated June 2, 2006 in this application rejected all of the pending claims (claims 1-50), as being anticipated by US Patent No. 6,347,091 issued to Wallentin et al (see part 6 on pages 3-5). In the Amendment and Response filed on November 2, 2006, applicant submitted several arguments against the Wallentin patent in their traversal of the rejection (see pages 10-12). In one of these arguments, applicant addressed the rejection's reliance on a specific statement in the Wallentin patent (at col. 6, lines 46-49) that an optimal channel type "may be dynamically/adaptively determined and allocated based on a single, relatively simple parameter such as the amount of data currently stored in a connection queue..."

In the next Office Action dated January 29, 2007, the claims were rejected as obvious based solely on the Wallentin patent (see part 6 on pages 3-5).[2] The comments in support of the obviousness rejection included and relied upon the same statement in the Wallentin patent quoted in the previous paragraph. However, the Office Action did not address applicant's arguments against the statement in the Wallentin patent. Instead, the Office Action dated January 29, 2007 included Form Paragraph 7.38, which generically stated that applicants' arguments against the previous anticipation rejection are moot.

Applicant filed the Request for Complete Office Action on April 29, 2007 (copy attached) seeking a response to his argument against the statement in the Wallentin patent that was still being relied upon. The Request specified, and indeed repeated, the statement and the argument against it (see page 2) in Applicant's previous response. The Request did not refer to or repeat any other previous argument against the Wallentin patent, and did not include any new arguments against the obviousness rejection. The Request did not address the other rejections in the Office Action in any way.

The Request pointed out that an Examiner Note to Form Paragraph 7.38 states that the examiner "must, however, address any arguments presented by the applicant which are still relevant to any references being applied" and explained that applicant's argument against the Wallentin patent was still relevant and not moot since the statement in the Wallentin patent that it addressed was still being relied upon to reject the claims. The Request thus requested that "the

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[2] The Office Action also included new rejections of the claims under 35 USC 112, first paragraph, and 35 USC 112, second paragraph.

current Office Action be corrected or supplemented..." and that applicant "have a period of at least one month in which to respond to any corrected or supplemental Office Action" pursuant to MPEP 710.06

The current Office Action dated June 8, 2007 provides the requested response to applicant's argument against the statement in the Wallentin patent (see page 6). Despite the apparent contradiction, the Office Action also alleges that the previous Office Action was complete, treats the Request for Complete Office Action "as a proper response to the last office action", and is designated as final.

Discussion

The finality of the current Office Action dated June 8, 2007 is improper for any one of several different reasons. It is particularly improper because it deprives Applicant of the opportunity to respond, with or without amendment, to the first Office Action merely because Applicant requested that the first Office Action be corrected or supplemented. See 35 USC 132.

The Request for Complete Office Action requested a "corrected or supplemental" office action and an opportunity to respond to the corrected or supplemental office action pursuant to MPEP 710.06 entitled "Situations When Reply Period Is Reset or Restarted". There is no indication in MPEP 710.06 or elsewhere that the corrected or supplemental Office Action should, or may, be made final. By making the corrected or supplemental office action final when the original defective Office Action was non-final, instead of merely resetting or restarting the reply period, applicant has been improperly deprived of the opportunity to respond to the original non-final office action. The current Office Action does not even acknowledge or address MPEP 710.06, and thus fails to properly process the Request for Complete Office Action.

The current Office Action incorrectly states that the Request for Complete Office Action was a proper response to the Office Action. It is apparent from an objective review of both the mere title, and the content, that the Request for Complete Office Action was not a substantive response to the Office Action. Since it did not address the rejections under 35 USC 112, first paragraph, and 35 USC 112, second paragraph, it was not responsive according to 37 CFR 1.111(b) and MPEP 714.02. So serious is the substantive deficiency that the Request for

Complete Office Action could even be considered to not be a *bona fide* response to the Office Action. See MPEP 714.03.

The current Office Action also incorrectly states that applicant "requested another office action because he felt that the examiner's conclusions were erroneous" and that the Request for Complete Office Action "provides argument on the merits of the rejection." An objective review of the Request reveals that applicant asked that the office action be corrected or supplemented pursuant to MPEP 710.06 because the Examiner had not responded to an argument that was still relevant and not moot. The error complained of was the procedural failure to answer applicant's argument according to MPEP 707.07(f). Applicant merely **specified and repeated** the previous argument, to which the Examiner had not responded, as part of showing the incompleteness in the office action.

The current office action also states that the office action "is not incomplete just because examiner draws conclusion which applicant does not agree with" and that "the ground of rejection was changed, and all the reasoning for the rejection was provided in full" (underlining in original). Again, an objective review of the Request for Complete Office Action indicates that applicant merely objected to the failure of the Examiner to respond to the previous argument against the Wallentin patent that was still relevant according to the MPEP note to Form Paragraph 7.38. The current office action rejects the claims as being obvious over the Wallentin patent, whereas the first office action rejected the claims as being anticipated by the Wallentin patent and to the contention, and it can be accepted for the sake of argument that the rationale of the obviousness rejection based on the Wallentin patent was sufficiently stated if it had been the first Office Action in this application. But Again, the Examiner refuses to address the note to Form Paragraph 7.38, and utilizes a different criteria (for which no authority is cited) for determining the completeness of an office action.

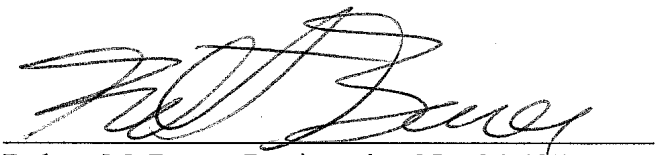
Moreover, and most importantly, the issue of whether or not the previous office action was incomplete simply has no bearing on the finality of the Office Action. Even assuming for the sake of argument that the previous office action had been complete, the proper course of conduct would have been to deny the Request for Complete Office Action, refuse to mail another office action, and refuse to reset or restart the reply period. There is no reason to instead mail

another office action and then make that office action final. A conclusion that applicant had submitted a substantive response to the previous office action simply does not match the facts and ignores the plain language of the Request for Complete Office Action. While a corrected or supplemental office action was appropriate, making the office action final is inappropriate and severely prejudicial because applicant no longer has the opportunity to respond, with or without amendment, to the previous office action.

Conclusion

For at least the above reasons, applicant respectfully petitions for withdrawal of the finality of the current Office Action. Applicant authorizes the petition fee, and any other fees necessary for the consideration of this Petition or to avoid abandonment of the application, to be charged to Deposit Account No. 10-0100 (Dkt. No. NOKIA.4008US).

Respectfully submitted,



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April 29, 2007

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REQUEST FOR COMPLETE OFFICE ACTION

Applicant gratefully acknowledges the currently outstanding second Office Action dated January 29, 2007 rejecting the pending claims. Unfortunately, the Office Action incorrectly concludes that applicant's arguments against the rejection are moot. However, applicant's arguments are not moot because they address the same prior art reference that is still being applied to reject the pending claims. It is therefore requested that the second Office Action be corrected or supplemented to include responses to applicant's arguments against the applied prior art reference.

The first Office Action dated June 2, 2006 rejected all of the pending claims (claims 1-50), as being anticipated by US Patent No. 6,347,091 issued to Wallentin et al (see part 6 on

pages 3-5). Specifically, the rejection relied upon the statement at col. 6, lines 46-49, that an optimal channel type "may be dynamically/adaptively determined and allocated based on a single, relatively simple parameter such as the amount of data currently stored in a connection queue..." In the Amendment and Response filed on November 2, 2006, applicants submitted arguments responding to this reliance upon the Wallentin patent. Specifically, applicants stated the following:

> "Wallentin provides packet data services where packet data connections are established between a mobile station and radio access network. Specifically, Wallentin uses one of a plural of different types of radio channels bearing the packet data connections over a radio interface. Using the Channel Select routine shown in Fig. 4 of the patent, Wallentin determines the best type of channel to carry future packet data to be sent over the packet data connection from a single measured parameter. Specifically, the optimal channel type is dynamically/adaptively determined and allocated based on a single relatively simple parameter, that parameter being the amount of data currently stored in a connection queue.
>
> Contrasting Wallentin now with the claims, instead of allocating one of the communication resources based on the size of at least one packet to be transferred as recited in the amended independent claims, Wallentin only determines the amount of space remaining in each of the queues and uses that parameter. Wallentin does not allocate one of the communication resources "based on the size of at least one packet to be transferred" as recited in the claims. Nor is "information relating to the size of the at least one packet to be transferred" provided to a network element in Wallentin performing the allocating step." (underlining added to indicate language repeated applied in rejections)

In part 6 on pages 3-5 of the current Office Action, the pending claims are rejected as being obvious based on the Wallentin patent, and the same language is again quoted and relied upon in the rejection. However, the current Office Action does not address applicant's arguments against the patent.

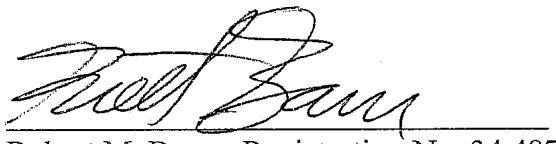
Part 7 on page 5 of the current Office Action includes Form Paragraph 7.38, which states that applicants' arguments against the obviousness rejection are moot, but this is not the case. Applicants' arguments are still applicable since the Wallentin patent is still being relied upon to reject the claims. The MPEP includes an Examiner Note to Form Paragraph 7.38 which states

that the examiner "must, however, address any arguments presented by the applicant which are still relevant to any references being applied." Therefore, since the Wallentin patent is still being applied, even if in an obviousness rejection, applicants' arguments against it are still relevant and must be addressed.

Conclusion

Applicants respectfully request that the current Office Action be corrected or supplemented to include a response to applicants' arguments against the Wallentin patent. Pursuant to MPEP 710.06, applicants request that they have a period of at least one month in which to respond to any corrected or supplemental Office Action.

Respectfully submitted,



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